Supreme Court, U.S.
FILED
APR 30 1997
OFFICE OF THE CLERK

(4)

No. 96-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, *et al.*,
Petitioners,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

For two decades following Congress's adoption of the "sole function" test in 1974, Congress, this Court, and the Executive Branch uniformly recognized that the National Security Council ("NSC") is an agency under the federal records preservation and disclosure laws. Respondents' 29-page opposition to certiorari rests on the untenable premise that the District of Columbia's ruling reversing this historical view has no legal or practical consequences. Regardless of whether the decision below is correct or not, the decision reflects an important change in the interpretation of the laws governing preservation and disclosure of government records that should be reviewed by this Court.

I.

Contrary to respondents' argument, the decision below does not reflect "application of established legal principles." Opp. at 15. The ruling below is inconsistent with this Court's conclusion that the NSC is an agency in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), because the Circuit Court did not apply the "sole function" test of *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), but a new, three-factor test first announced in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993). The *Meyer* test is not based on the statutory language, which explicitly provides that establishments in the EOP are agencies, without providing any exception. 5 U.S.C. § 552(f); 44 U.S.C. § 2901(14). Nor is the *Meyer* test based on legislative history. Instead, the Circuit Court has abandoned the "sole function" standard in favor of a test that significantly expands the limited exception that Congress created for units of the EOP that solely advise and assist the president. *See Meyer*, 981 F.2d at 1312 (Wald, J., dissenting); App. at A42-43 (Tatel, J., dissenting).

Nor does the decision below rest on any grounds that are "unique" to the NSC and have no consequences for other units of the EOP. The Circuit Court did not rule that, because the President is a member of the Council, it cannot be an agency. Rather, the Court found that the "proximity" factor introduced in *Meyer* required that the Court give overwhelming weight to the President's role on the Council, and the fact that the President's "National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff." App. at A12.

The NSC is not unique in these respects. The President is also a member of the Office of Administration, Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101, 91 Stat. 1633, § 2 (1977),[1] and the staff of all EOP units are controlled by Presidential advisors under the direct supervision of the President. Prior to *Meyer*, EOP units headed by personal advisors of the President — like the unit involved in *Soucie* itself — were held to be agencies despite their proximity to the President. The ruling below represents a fundamental departure from *Soucie* that casts doubt on the

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[1] Respondents' assertion that Executive Order No. 12,122, 44 Fed. Reg. 11,197 (1979), demonstrates that the President is not the head of the Office of Administration, Opp. at 18 n.5, is inaccurate. That order simply delegates to the Director of the Office of Administration responsibility to "do all other things that the President, *as head of the Office of Administration*, might do." *Id.* § 4 (italics added). Moreover, if the status of an entity like the Office of Administration turns on whether it is headed by the President, or by a Presidential advisor who reports directly to the President, the President could exempt an EOP entity performing agency functions from the federal records laws by simply issuing an executive order that makes a nominal change, naming the President as the head of the organization and charging the advisor to act at the President's direction.

status of other EOP units that, like the NSC, have long been considered "agencies" under the federal records laws.

Moreover, the Circuit Court's decision represents a sharp departure from the pre-*Meyer* law on what constitutes "independent" authority. Respondents attempt to minimize the gravity of this ruling by asserting that the majority simply concluded that "independence" requires the "power to select from among alternative courses of action *without the benefit of express presidential direction.*" Opp. at 19 n.7 (italics in original). The decision below, however, contains no such language, but if that standard is applied, the NSC has "independent" authority.

Instead, the Circuit Court maintained that, although the President has delegated authority to the NSC subcommittees and staff, such authority is not "independent" under *Meyer* unless the plaintiff proves that the authority is exercised without the consent of the President or his national security advisor. *Id.* at A17. Indeed, the majority below acknowledged that the NSC performs agency functions, but rested its ruling on the premise that the NSC did not "appear to exercise any *significant* non-advisory function" because there was no evidence that the NSC used its authority "without direct supervision by the President." App. at A21 (italics added). Under this new test for "independence," it is unclear whether any EOP unit can qualify as an agency — a result that is inconsistent with Congress's express language including the EOP in the definition of agency. *See Meyer*, 981 F.2d at 1309 (Wald, J., dissenting) (Under the majority's approach, "[o]nly renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'"); App. at A35-36 (majority decision creates an "impossible hurdle") (Tatel, J., dissenting).

Finally, the Circuit Court's departure from the test endorsed in *Kissinger* deserves review, even in the absence of an inter-circuit conflict, because of the District of Columbia Circuit's unique authority over records preservation at the EOP. Respondents correctly argue that

an inter-circuit conflict is *possible* with respect to *FOIA* because a FOIA action can be brought in other circuits — although what point would be served by requiring a repetition of this lengthy dispute is unclear. Opp. at 24. But respondents do not contend that such an inter-circuit conflict is likely, nor do they contend that it is even possible with respect to the issue of whether records of the EOP are being properly preserved in accordance with the Federal Records Act. The District of Columbia courts are likely to be the only courts that would have jurisdiction to grant the type of injunctions against destruction of EOP records that were issued in this case. Thus, the Circuit Court's decision to exempt an EOP unit such as the NSC from the Federal Records Act will effectively become a national rule, unless reviewed by this Court. Access to NSC records under the FOIA is virtually meaningless if EOP records can be improperly destroyed, and judicial review to prevent such destruction is currently foreclosed by the District of Columbia's conclusion that the NSC is exempt from compliance with the Federal Records Act.

II.

Respondents also claim that exempting the NSC from the Federal Records Act is of no practical importance. Opp. at 24-25. However, there is no question that the NSC controls an enormous volume of historically important records concerning the formulation and implementation of foreign affairs, diplomatic, military, and intelligence policy. The history of this case demonstrates that the risk that records of the NSC and other EOP units may be improperly destroyed is very real; but for the injunctions entered in this action, most of the records at issue here would have been summarily destroyed by the EOP at the end of the Reagan and Bush administrations.

The ruling below, however, removes any external restraint on the NSC's ability to destroy its records in the

future. As explained in our petition, if the NSC is not subject to the Federal Records Act, the District of Columbia Circuit has held that courts lack the authority to review whether the NSC is unlawfully destroying records. *Armstrong v. Bush*, 924 F.2d 282, 289-90 (D.C. Cir. 1991). In addition, the Archivist lacks authority to recover improperly removed records, or to even inspect the NSC's records management practices. *See* Pet. at 6. The ruling below therefore jeopardizes the fate of important records, whether recorded on paper or electronic form, relating to activities such as the Iran-Contra Affair, arms control policy, and intelligence gathering. The Circuit Court's holding that such records are not protected from arbitrary destruction creates a gap in the records preservation laws that has enormous practical significance, and should not be permitted to stand without review by this Court.

III.

In the final pages of their Opposition, respondents argue that, even if the NSC is an agency, agency compliance with the Federal Records Act is not subject to judicial review. Opp. at 26-28. We do not believe that this issue is fairly included in the question presented, and respondents, who lost this issue below, have not cross-petitioned for review of this issue. In addition, if this issue is open to review by this Court, the question of whether compliance with the Presidential Records Act is subject to judicial review is also open to consideration at this stage.

Most importantly, if the lower court's holding that the Federal Records Act is judicially enforceable is open to consideration by this Court, respondents' argument does not provide a reason to deny review, but an additional reason for this Court to grant review. Respondents argue that judicial review of compliance with the Federal Records Act is inappropriate because it "would significantly alter the scheme created by Congress, create undue delay, and disrupt agency

functioning." Opp. at 28. However, this claim argues in favor of granting review because all federal agencies are now subject to precisely the judicial review respondents denounce. In 1983, the District of Columbia Circuit held that agencies and the Archivist are subject to judicial review to determine whether their decisions concerning disposal of records comply with the Federal Records Act, and that researchers have standing to bring such actions. *American Friends Service Committee v. Webster*, 720 F.2d 29, 41-45, 53-57 (D.C. Cir. 1983). In an earlier ruling in this action, the Court held that such judicial review includes the authority to review whether agency guidelines on records management comply with the Federal Records Act. *Armstrong v. Bush*, 924 F.2d at 291-94. Petitioners believe that the Circuit Court's rulings on these issues are correct, but that its ruling limiting judicial review of compliance with the Presidential Records Act is in error. *Id.* at 289-90. Respondents' attack on judicial review, however, only suggests an additional reason to grant review to resolve whether private citizens can bring actions to ensure compliance with the Federal Records Act and Presidential Records Act.

CONCLUSION

For reasons stated above, and in petitioners' petition, this Court should grant the petition to review the District of Columbia Circuit Court's ruling that the NSC is not an agency.

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